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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 487

NATIONAL BANK OF WASHINGTON and
FRED A. SMITH & CO., *Petitioners,*

v.

GERTRUDE McGETTIGAN, Individually and as mother and next friend of CHARLES S. McGETTIGAN, a minor,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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v.

GERTRUDE McGETTIGAN, Individually and as mother and next friend of CHARLES S. McGETTIGAN, a minor, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case entered on May 16, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 240-249), also printed in Appendix A hereto, *infra*, p. 1a, is reported at 199 F. Supp. 133 (D. D.C., 1961). The opinion of

the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, p. 11a, is not yet reported. The supplemental opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 24a, also is not yet reported. An opinion dissenting from the denial of the petition for rehearing *en banc*, printed at Appendix A hereto, *infra*, p. 26a, is also unreported.

JURISDICTION

The opinion of the Circuit Court of Appeals was entered on May 16, 1963, Appendix A hereto, *infra*, p. 11a. A timely petition for rehearing filed on May 31, 1963, was denied on June 27, 1963, and a supplemental opinion was filed by the Court of Appeals on that date, Appendix A hereto, *infra*, pp. 24a, 26a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Has a landowner, who is not a user or storer of flares or similar items and who has no reason to suspect the presence of a flare on his land, the duty to inspect his premises to discover whether unknown third parties may have deposited thereon a flare or similar instrumentality which may be carried off by a trespassing child with the result that harm is later caused to a different child off the premises?

2. Is the act of a landowner in maintaining a shed which is dirty and sometimes frequented by persons of ill repute the proximate cause of injury which occurs when unknown third parties deposit on the premises a flare which is carried off by an eleven-year-old trespasser, which passes through the hands of his fifteen-year-old brother and his mother, and which the next day comes into the possession of a nine-year-old

brother who is injured after breaking it and lighting it on fire?

3. Is injury to the nine-year-old boy under the circumstances set forth in Question 2 a reasonably foreseeable result of the mere maintenance of a shed which is dirty and sometimes frequented by persons of ill repute?

STATEMENT

Respondents filed an amended complaint for personal injuries on June 9, 1958, in the United States District Court for the District of Columbia. The parties completed exhaustive pretrial discovery including the taking of nine depositions, and the answering of numerous interrogatories. (R. 8-63, 65-197).

An elaborate pretrial order was prepared which set forth the facts and the parties' legal contentions. Thereafter, in connection with their motion for summary judgment, the petitioners served on respondents a statement of undisputed material facts, pursuant to Rule 9(h) of the District Court. (R. 225). Subsequently there was filed a "Statement by Plaintiffs Controverting 'Statement of Uncontroverted Material Facts' Filed by the Defendants." (R. 235).

As a consequence it was established factually that Charles McGettigan, aged 9, was burned at his home at 1117 24th Street, N.W. in the District of Columbia on March 4, 1956, under the following train of circumstances. The previous day a brother John McGettigan, aged 11, had entered a brick shed behind premises 2413 Pennsylvania Avenue, N.W. (R. 40 *et seq.*). Those premises were owned by the National Bank of Washington as trustee and managed by the realty firm

of Fred A. Smith Company. (R. 116). The first floor of the principal structure on the premises was suitable for commercial tenants, but was vacant on March 4, 1956. The upper floors were residential. (R. 117-118). John McGettigan was generally discommodious and kicked about certain trash and debris in the shed which had apparently accumulated therein through the conduct of neighborhood derelicts and children. (R. 44, 45).

In the course of dislodging with his feet some trash in a closet in the shed, John McGettigan uncovered a cylindrical cardboard object approximately two feet in length covered with a brownish paper. (R. 40-42, 43-46). John said: "I was in there a lot and I kicked things around and broke bottles and I had seen this thing just at a glance and I told you I thought it was a pipe or something like that." (R. 50). John also said: "I had seen it in there before, but I didn't go right after it. It wouldn't be something you would be right away attracted to, till the day I kicked it." (R. 50). It bore a label showing it had been manufactured by the "Hitt Fireworks Co." (R. 105, 106). He took it from the premises to his home several blocks away (R. 39, 45). He used it as a bat, striking rocks and boxes with it. (R. 46, 55). At home it was taken away from John by his older brother, Patrick McGettigan, aged 15, and given to the boys' mother. (R. 179). The mother deposited the object in the trash outside her back door from which it was removed the following day by John's younger brother Charles, then 9 years old.

Charles played with it in his back yard. In his curiosity he wanted to open it. With a screw driver he punched holes in the container until he was finally able to break it in two. He poured the contents out on

the back steps. The powder was gray. It "kind of" looked the same as powder inside caps or fireworks. (R. 59). The mother, observing the scene, directed her son to clean up the mess and left. (R. 14). The powder was carefully swept into a mound. Charles placed a piece of wax paper in it, obtained a match from his kitchen and lit the wax paper. The resulting flames severely burned him. The object had turned out to be a flare. (R. 61).

None of the business occupants of premises 2413 Pennsylvania Avenue, N.W., would have had occasion in the normal course of their business to use or store such an instrumentality as a flare. (R. 117, 118). As the Court of Appeals opinion below pointed out, it was "not alleged that the defendants brought the flare to the premises or knew it was there." (Appendix A, *infra*, at p. 13a).

The U. S. District Court granted the petitioners' motion for summary judgment on November 20, 1961. In its opinion (R. 240-242, Appendix A, *infra*, at pp. 3a) the District Court succinctly summarized the issue of actual knowledge as follows:

> The plaintiff claims to be entitled to recover damages on the theory of attractive nuisance. The defendants contend that this humanitarian principle is limited to situations in which the property owner himself maintains the structure or places on the property the object, which is asserted to constitute the attractive nuisance, as well as to instances in which he at least is aware of its existence and does nothing to safeguard children against it. It is claimed on behalf of the defendants that the doctrine does not apply if the object constituting the nuisance is placed on the property by a third person and its presence is not known

to the property owner. These conflicting contentions present the issue of law to be determined on this motion.

The Court, after a thorough review of applicable precedents, concluded as follows (R. 248, Appendix A, *infra*, at p. 9a):

> The principles to be evolved from the line of authorities discussed in this opinion, may be summarized as follows: If the owner or possessor of real property maintains a hazardous structure, or keeps a dangerous object, on his land, which has a natural tendency to attract or allure children, and if children are accustomed to visit or congregate on the grounds, then the property owner is liable for any injury that may be sustained by a child as a result of contact with the structure or object. This liability extends to a situation in which the dangerous object was placed on the property by a third person if the property owner had actual knowledge of its presence. On the other hand, there is no liability on the part of the owner if a third party creates the dangerous situation and its existence is unknown to the property owner. The latter is under no obligation to make periodic inspections in order to ascertain whether any hazard has been created by any third person and to safeguard against any such remote possibility.
>
> Applying the foregoing principles to the admitted facts of this case, no basis for liability is discernible. No legal or moral obligation can be perceived on the part of the defendants to pay the plaintiffs for the result of their tragedy.

Timely appeal was noted by the respondents. The argument on appeal was heard on January 3, 1963, before a Division of the Court of Appeals for the District of Columbia Circuit, consisting of Judges Edgerton, Fahy, and Wright. That Court reversed the District

Court *per* opinion by Judge Fahy which was handed down on May 16, 1963. Touching on the vital issue whether the petitioners had knowledge of the existence of the flare the opinion stated (Appendix A, *infra*, at p. 16a):

> In the present case defendants contend that since the dangerous instrumentality was not used by them or brought by them onto their premises the plaintiffs could not recover. This contention fails to take account of the scope both of the law of negligence and the full development of the attractive nuisance doctrine. . . .

In framing that key issue, the Court of Appeals' opinion, unlike that of the District Court, failed to take into account the undisputed fact of absence of actual knowledge on the part of property owner of the presence of the allegedly dangerous instrumentality. The Court of Appeals concluded (Appendix A, *infra*, at p. 17a):

> Nor is the doctrine inapplicable because the dangerous condition is not created by the landowner or possessor. *If third persons, even trespassers unknown to the landowner or occupier, come onto the land and create the artificial condition, or deposit the harmful object, and the owner does nothing to remedy the condition after a reasonable opportunity to do so, he may be responsible.* *Roman* v. *City of Leavenworth*, 90 Kan. 379, 133 Pac. 551 (1913); *Simmel* v. *New Jersey Coop. Co.*, 47 N.J. Super. 509, 136 A. 2d 301 (App. Div. 1957); *Johnson* v. *Sculley Constr. Co.*, 95 N.W. 2d 409 (Minn. 1959). (Emphasis added.)

Applying that doctrine to the instant case, the Court of Appeals stated (Appendix A, *infra*, at p. 20a):

> The data before the trial court created an issue as to an unreasonable risk of harm towards the

minor plaintiff, a child of the neighborhood, whose injury a jury might reasonably conclude might have been prevented by due care on the part of defendants.

A timely petition for rehearing *en banc* was filed, in which it was asserted that the opinion of the Court of Appeals was erroneous in three respects:

1. It strongly relied upon an important factual assumption which was unquestionably and demonstrably incorrect. The opinion stated that a gang of young thieves, which at times used the premises, had used stolen flares for purposes of amusement near the premises. The sole source in the record of information relating to such flare-stealing activities was the deposition of Leslie O'Neal, Jr. (R. 96-110). O'Neal established that his gang had never had any flares anywhere near the premises. (R. 100-196).

2. It imposed liability in a fashion which every other court which had considered the problem had refused to do, and in so doing had relied heavily upon a precedent which had been overruled, and upon a provision of the RESTATEMENT, TORTS, § 339 (1934), which had undergone such a revision in 1960 that it had become authority of the most persuasive sort for the position of the landowner. See § 339 of Tentative Draft No. 5 of the RESTATEMENT (SECOND), TORTS (1960), the adoption of which is reported at p. 241 of the 1960 Proceedings of the American Law Institute. That Tentative Draft with its accompanying text and the minutes of the proceedings of the American Law Institute made it clear that actual knowledge had universally been required in cases

of this type, and that a landowner under these circumstances had no duty to inspect.

3. It adopted a theory that conduct could amount to actionable negligence regardless of whether the general type of harm which ensued was a foreseeable result of the conduct. That theory conflicts with the recent *en banc* opinion of the same Court in *Jamieson* v. *Woodward & Lothrop*, 101 U.S. App. D.C. 32, 38, 247 F.2d 23, 29, *cert. denied* 355 U.S. 855 (1957). What reasonable man could foresee that failure to keep a clean or locked shed in a back yard would result in a veritable bomb exploding in the face of a child several blocks away?

On June 27, 1963, the petition for rehearing *en banc* was denied and a supplemental opinion was filed by the Division of the Court of Appeals which had heard the appeal (Appendix A, *infra*, at p. 24a). The supplemental opinion stated in part (Appendix A, *infra*, at p. 24a):

> We adhere to our views as expressed in our opinion, adding that were we to apply the changed language of Section 339 of the Restatement to this case a reversal would still be required; for the data before the District Court if followed by proof would enable a jury to find that appellees had reason to know that the "fact"—that is, the described condition—existed and the place was being used by children. If, however, the change in Section 339 means that if such a situation as is now before us the appellees must be shown to have had reason to know that the flare itself existed among the rubbish, we disagree.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. This case merits Supreme Court review because the decision below is the product of judicial legislation which not only lacks precedent, but which is at war with the conclusion reached by every other jurisdiction which has considered the principal issues involved. The petitioners recognize that this Honorable Court follows a policy of judicial restraint with regard to review of District of Columbia matters. However, petitioners urge that the supervisory power of this Court over the U. S. Court of Appeals for the District of Columbia Circuit ought to be exercised where that court decides, without precedent and originally in reliance on a reversed case and on other inapposite cases, to depart from recognized legal standards in an area as important as the basic duties owed by the class of landowners to trespassing children. This area of local law is of such importance that it merited review by this Court once before. *Best* v. *District of Columbia*, 291 U.S. 411 (1934). Review is especially necessary since the District does not have its own legislature to correct unwarranted judicial legislation.

Departure From Existing Precedent

The decision below is not only at conflict with the decisions of the highest courts of all jurisdictions which have considered the question, but it also goes substantially beyond the guidelines laid down by this Court in the case of *Best* v. *District of Columbia*, 291 U.S. 411 (1934). *Best* held that a cause of action existed where a five-year-old boy was attracted by sand piles onto the private wharf of the municipality where he fell through one of several holes in the wooden

planking and was drowned. This Court there quoted with approval, at 291 U.S. 419, its earlier words in the case of *United Zinc Co. v. Britt*, 258 U.S. 268 (1922), that:

> *knowingly* to establish and expose, unfenced, to children of any age where they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. (Emphasis added.)

While those earlier decisions of this Court spoke of *knowing* actions on the part of the defendant, the decision below is that liability may be fastened upon a landowner who lacks knowledge of the presence of an instrumentality on his premises, deposited there by unknown third parties, which, one day after removal from the premises by one child, injures another child.

Conflict With Every Other Jurisdiction.

The following decisions of state courts of last resort are in direct conflict with the opinion of the Court of Appeals below, and hold that a landowner is under no duty whatsoever to inspect the land to discover conditions likely to harm trespassing children, and holding correlatively that there is no liability in such cases in the absence of actual knowledge of the condition. *Hale* v. *Crestline Realty, Inc.*, 148 Conn. 643; 173 A.2d 500 (1961); *Simmel* v. *N. J. Coop. Co.*, 28 N.J. 1, 143 A.2d 521 (1958); *Gallagher* v. *Frederick*, 366 Pa. 450, 77 A.2d 427 (1951); *Carter Coal Co.* v. *Smith*, 173 Ky. 843, 191 S.W. 631 (1917); see also *Castella* v. *Caristo Construction Corp.*, 12 A.D.2d 605, 208 N.Y.S.2d 577 (1960), *aff'd*, 10 N.Y.2d 945, 179 N.E.2d 863, 224 N.Y.S.

2d 23 (1961).[2] No jurisdiction in which this issue had been considered heretofore had adopted the position taken by the Court of Appeals below.

Reliance on Reversed Opinion

The Court below, in finding that a duty of inspection existed under the circumstances of this case, cited three cases, the *Simmel* case, *supra*, and two other decisions.[3] (Appendix A, *infra*, at p. 17a). In the other two cases, the defendants had actual knowledge of the condition which caused injury, and thus they do not support the doctrine inherent in the opinion below.

As to *Simmel*, the Court below did not rely upon the New Jersey Supreme Court decision but rather on an intermediate appellate decision reported at 47 N.J. Super. 509, 136 A.2d 301 (App. Div. 1957). The original opinion of the Court below was silent as to the subsequent history of the intermediate appellate decision.

The Supreme Court of New Jersey in fact reversed that decision, 28 N.J. 1, 143 A.2d 521 (1958), in an opinion which was cited in appellees' brief below at page 16. The Supreme Court of New Jersey held that the trial judge's instructions had been erroneous because they permitted a finding of liability on imputed

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[2] Of the jurisdictions listed, only New York has recognized this requirement by a mere affirmance of a lower court. The others have done so in lengthy and well-reasoned opinions. For a summary and discussion of the listed cases, please refer to the brief for appellees, pp. 15-19. That brief has been specially certified to this Court by the Clerk of the United States Court of Appeals for the District of Columbia Circuit.

[3] *Johnson* v. *Sculley Constr. Co.*, 95 N.W.2d 409 (Minn. 1959); *Roman* v. *City of Leavenwarth*, 90 Kans. 379, 132 Pac. 531 (1931)

rather than actual knowledge. The intermediate appellate court had ruled that there was sufficient evidence from which to conclude actual knowledge.

When petitioners in their petition for rehearing *en banc* below, protested that the decision of the Court of Appeals had fashioned an unprecedented doctrine of tort liability in reliance on a reversed intermediate appellate decision of a state court, the Court below issued an order correcting its earlier opinion to the extent that the *Simmel* case was marked as "rev'd on other grounds." (Appendix A, *infra*, at p. 23a).

A reading of both the intermediate appellate and the supreme court opinion in the *Simmel* case leads inescapably to the conclusion that the reversal came about only because the jury had been permitted to impute to defendant knowledge of the dangerous condition by dint of the mere passage of time. 143 A.2d at 528. The original Court of Appeals opinion below cited the intermediate opinion in *Simmel* for the proposition that failure "to remedy the condition [created by unknown third parties] after a reasonable opportunity to do so" may provide a basis for liability. (Appendix A, *infra*, at p. 17a). From a reading and study of the New Jersey opinions, it does not appear that the *Simmel* case was "reversed on other grounds."

In view of the lack of support from *Simmel* for the Court of Appeals' novel theory of liability, and in view of the fact that the other cases cited by the Court of Appeals are not in point,* it must be concluded that the Court of Appeals has decided an important question of tort law in a way which goes beyond heretofore

* See summary and analysis of those opinions in appellees' petition for rehearing *en banc*, pp. 8, 9, 11 and 12.

applicable principles as enunciated in this Court's decision in the *Best* case, *supra*, and in sharp conflict with the general law of other states.[5]

Ensuing Injury Not Proximately Caused by Petitioners' Acts, and Not Reasonably Foreseeable

2. The decision of the Court below departs from recognized tort principles in a second important respect. The acts of persons not under the control of the petitioners intervened to such an extent in this case that the resulting injury can not be said to have been proximately caused by the petitioners. The injury occurred on the day following the day on which the flare was taken from the petitioners' premises, not by the injured boy, but by his brother. The flare, clearly showing that it was manufactured by the "Hitt Fireworks Company," passed through the hands of the injured respondent's 15-year-old brother and those of his mother. As was pointed out in the dissent to the denial of the petitioners' motion for rehearing *en banc* (Appendix A, *infra*, at p. 26a):

> Labeled as it was, the 15-year-old boy obviously recognized it as a possible source of danger. Certainly the mother could have done so. The mother had it within her power to make a condition of safety sure, but did not do so. Instead, she placed the flare in her own trash from which the following day it was removed by her younger son. . . .

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[5] A totally reliable and conclusive indication of the status of tort law in this connection is afforded by the RESTATEMENT (SECOND), TORTS (1960), Tentative Draft No. 5 of which contains a revised § 339, dealing with the "attractive nuisance doctrine." That section eliminates the duty to inspect. It was approved without dissent by the American Law Institute. See 1960 Proceedings of the American Law Institute, p. 244.

The dissent also pointed out that the mother saw the instrument after it had broken open and its powder spilled out by the as-yet-uninjured son. She simply told him to clean up the powder then she left the scene.

Universally applicable principles of tort law make it plain that the petitioners' actions in this case were not the proximate cause of the injuries of the minor respondent. Correlatively, a reasonable man could not predict that the consequence of allowing ordinary debris to accumulate in a shed would be the detonation of an unknown flare, deposited earlier in the shed by unknown third parties, which, after being carried off, would the next day severely burn a young boy several blocks away. A recent *en banc* opinion of the U. S. Court of Appeals for the District of Columbia Circuit held that the harm or injury which resulted must have been of the same general type which was reasonably foreseeable in order to spell out negligence. *Jamieson* v. *Woodward & Lothrop*, 101 U.S. App. D.C. 32, 38, 247 F.2d 23, 29, *cert. denied* 355 U.S. 855 (1957). See also *Palsgraf* v. *Long Island RR.*, 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928). The decision below conflicts with the *Jamieson* decision. The infant respondent's injury came as a complete surprise to the petitioners, not only because they had no reason to know or suspect that failure to keep a clean or locked shed would result in the presence of a flare on their premises, but also because no reasonable person could have been expected to foresee that the unsuspected instrument would pass without precaution through the hands of the 11- and 15-year-old brothers and through the hands of the supposedly responsible respondent mother into the hands of the 9-year-old injured boy.

The Matter of Policy

3. The writ should be granted for the further reason that this case presents an important issue which has wide ramifications. The manner in which it was resolved by the Court below will place upon all the landowners of the District of Columbia the onerous duty of inspecting their premises at frequent intervals to guard against the possibility that unknown third parties have there deposited dangerous instrumentalities. Any failure to so inspect would be at the landowner's peril. No other jurisdiction so burdens landowners.

This result has been reached without support in the decided cases and contrary to the RESTATEMENT, TORTS, in a jurisdiction which has no legislative voice. The opinion is based upon a purported development of a doctrine enunciated by this Court when it earlier considered the important questions of tort law involved here. *Best* v. *District of Columbia*, 291 U.S. 411 (1934). Accordingly, before this burden be permitted to fall upon landowners, this Court, in the exercise of its supervisory power over the United States Court of Appeals for the District of Columbia Circuit, should hear this case.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL R. CONNOLLY
JAMES A. BELSON
Counsel for Petitioners

APPENDIX A

[Filed Nov. 20, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1313-58

GERTRUDE McGETTIGAN, Individually and as mother and next friend of CHARLES S. McGETTIGAN, a minor, *Plaintiffs*

v.

NATIONAL BANK OF WASHINGTON, a corporation, and FRED A. SMITH COMPANY, *Defendants.*

Opinion

Paul R. Connolly, of Washington, D. C., for the defendants, for the motion.

Harry W. Goldberg, of Washington, D. C., for the plaintiffs, opposed.

This case involves a phase of that aspect of the law of negligence that is picturesquely denominated as the doctrine of "attractive nuisance". The action is brought in behalf of a little boy, who was badly injured by a flare picked up by his brother on premises owned by one of the defendants and managed by the other as agent. The flare was carried to the plaintiff's home and injured him while he was playing with its contents. The defendants move for summary judgment on the ground that on the admitted facts there is no liability as a matter of law.

The motion is made after exhaustive discovery proceedings have been had, and after the case was thoroughly pre-

tried. The salient facts are not in dispute. Actually the defendants accept the version elicited from the plaintiffs and their witnesses, as most of the events are unknown to the defendants or their agents.

The basic facts on which this controversy hinges are as follows. Adjoining a building in the heart of downtown Washington, which was actively occupied in part for commercial and in part for residential purposes, and located on the same lot, there was a small, dilapidated, deteriorated brick structure that had not been used for many years. It was in a state of disrepair. Its doors were broken and access to the interior was not barred. Vagrants and other persons of unsavory types frequently congregated at night in this vacant building, drinking alcoholic beverages and engaging in other activities. Children frequently came into the place to play. A great deal of debris and trash had gradually accumulated in it in the course of time.

The infant plaintiff is a little boy, who at the time of the occurrence about to be described was nine years old. He lived with his family a short distance away from the above mentioned property. One day his brother, who was two years older, while returning home from an errand aimlessly wandered into the abandoned structure. While ransacking among the rubbish, he found a cylindrical, tubular object. He picked it up and carried it home. Later the younger brother started to dismantle it. Unfortunately, the object was a flare and contained gunpowder. The gunpowder exploded and painfully and permanently injured the little boy. The injuries were of a very serious nature that may affect him throughout his life.

No one seems to know what type of flare it was or what it was used for although apparently it had been mixed with the debris and trash for some time. No one knew how it got there, or who placed or dropped it on the premises. Neither the owner nor the agent or their employees were aware of its presence. None of the owner's activi-

ties on the lot in question involved any use of explosives. The defendants did not store or keep any explosives there.

This action is brought against the National Bank of Washington, the owner of the building as trustee of an estate, and against Fred A. Smith Company, a real estate agent who managed the entire property in behalf of the owner. The plaintiff claims to be entitled to recover damages on the theory of attractive nuisance. The defendants contend that this humanitarian principle is limited to situations in which the property owner himself maintains the structure or places on the property the object, which is asserted to constitute the attractive nuisance, as well as to instances in which he at least is aware of its existence and does nothing to safeguard children against it. It is claimed on behalf of the defendants that the doctrine does not apply if the object constituting the nuisance is placed on the property by a third person and its presence is not known to the property owner. These conflicting contentions present the issue of law to be determined on this motion.

The progenitor of the doctrine of attractive nuisance is a decision rendered by the Supreme Court in 1873, in *Railroad Company* v. *Stout*, 17 Wall. 657. In that case, a child six years of age was playing on a railroad turntable located in an open space near a railroad depot. As was well known to the Company's employees, boys were accustomed to play and swing on the turntable from time to time. On the occasion in question, the child's foot was caught and crushed between the ends of two rails as the turntable was revolving. The turntable was neither fastened nor locked and rotated easily on its axis although it could have readily been made fast by a latch. It was held that the child was entitled to recover damages from the railroad company for the injury that had been sustained. In discussing this subject, the Court stated that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult; that a turntable was a dangerous machine; and that the defendant was under a duty to give

it that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow. While the Court did not discuss the theory on which this decision was predicated, it was later stated that the doctrine of this case is "that he who places upon his land, where children of tender years are likely to go, a construction or agency, in its nature attractive, and therefore a temptation, to such children, is culpably negligent if he does not take reasonable care to keep them away, or to see that such dangerous thing is so guarded that they will not be injured by it when following the instincts and impulses of childhood, of which all mankind has notice".[1] Because of the fortuitous circumstance that the dangerous object involved in this case was a railroad turntable, decisions applying these principles have sometimes been informally referred to as "turntable cases".

In 1922 the Supreme Court in *United Zinc Co.* v. *Britt*, 258 U. S. 268, partially retreated from the forward position that it had taken in *Railroad Company* v. *Stout*, *supra*. The defendant in the later case had torn down a building owned by it, leaving a basement and cellar in which water accumulated, clear in appearance, but in fact dangerously poisoned by sulphuric acid and zinc sulphate that had percolated from the owner's works, as the owner knew. Two little children came on the land, went into the water, were poisoned and died. At the trial, the judge instructed the jury that if the water looked clear, but in fact was poisonous and the children were allured to it, the owner was liable to pay damages for the death of the children. The judgment was affirmed by the Court of Appeals, but was reversed by the Supreme Court in an opinion written by Mr. Justice Holmes. While the Court referred to *Railroad Company* v. *Stout*, without overruling or disapproving it, it held that there can be no general duty

[1] Dissenting opinion of Mr. Justice Clarke in *United Zinc Co.* v. *Britt*, 258 U. S. 268, 277.

on the part of a landowner to keep his land safe for children, if he had not directly or by implication invited or licensed them to come there.' The Court practically restricted the *Stout* case to its facts and did not indicate any real distinction in principle between the two decisions. An emphatic dissenting opinion was written by Mr. Justice Clarke, with whom Chief Justice Taft and Mr. Justice Day concurred.[2]

In reliance on the *Britt* case, the Court of Appeals for the District of Columbia, two years later, in *Brohan* v. *Winsatt*, 54 App. D. C. 374, 298 Fed. 833, declined to apply the doctrine of attractive nuisance to a pile of loose lumber in a lumber yard on which children had been wont to play. In that case while a group of children were struggling to reach the top of the pile, one of the boards was displaced and fell on a little girl, who sustained permanent injuries. The Court held that the child was not entitled to recover damages from the owner of the property. The Court indicated that *Railroad Company* v. *Stout* must be deemed practically overruled by *United Zinc Co.* v. *Britt*. Thus, for the time being the doctrine of attractive nuisance had very little efficacy, if any, in the District of Columbia.

The doctrine, however, rode out the storm and in 1934 was restored to its original course by the decision of the Supreme Court in *Best* v. *District of Columbia*, 291 U.S. 411. That case presented the following situation. A child five years of age while playing on a wharf belonging to the District of Columbia, fell through a hole and was drowned. There were a number of holes in the wharf floor

[2] *Prosser on Torts*, 2d Ed. 440, states that the opinion of Mr. Justice Holmes "has been much criticized". He also refers in Footnote 30, on the same page, to the fact that the Massachusetts court of which Mr. Justice Holmes had been a member, was one of the minority group that had rejected the doctrine of attractive nuisance entirely. In fact the dissenting opinion in the *Britt* case indicated that the majority were actually overruling the *Stout* case.

and the area in which they were found was not fenced off. Children had been accustomed to play there. The trial judge directed a verdict in favor of the defendant on the opening statement of plaintiff's counsel. The Court of Appeals affirmed the judgment for the defendant, largely on the authority of the *Britt* case, although Judge Groner dissented, 62 App. D. C. 274. On certiorari the Supreme Court, in an opinion by Mr. Chief Justice Hughes, reversed the judgment and reaffirmed the decision in *Railroad Company* v. *Stout*, *supra*. The ultimate result is that the *Britt* case in the Supreme Court, and *Branan* v. *Wimsatt*, *supra*, in this jurisdiction, were no longer law or, at least, their authority was very much weakened, and that the doctrine of attractive nuisance evolved from the pioneer decision in *Railroad Company* v. *Stout*, *supra*, was restored to its original potency.[3]

The Court of Appeals for the District of Columbia acted on this view in *Eastburn* v. *Levin*, 72 App. D.C. 190, 113 F. 2d 176. In that case piles of junk located on the defendant's yard, which bordered on a street and was not completely fenced off, were deemed to be an attractive nuisance. Several boys entered the yard and one of them climbed on a discarded car, which was in a pile of junk. The car tilted and threw him against broken glass. The property owner was held liable for damages for the child's injury. The Court relied on *Railroad Company* v. *Stout*, and *Best* v. *District of Columbia*, *supra*.

The doctrine of attractive nuisance is, however, in those jurisdictions in which it prevails, universally restricted and circumscribed by well defined and well established limitations. The liability of the property owner for injuries

[3] *Prosser on Torts*, 2d Ed. 400, Footnote 31, suggests that while the *Britt* case was cited with apparent approval in the *Best* case, the decision in the latter was quite inconsistent with the former. It, perhaps, would not be too far-reaching a statement to say that, in effect, the *Britt* case was overruled by the *Best* case.

caused to a child by what may be deemed to be an attractive nuisance, is confined to cases in which the property owner either erects or maintains the dangerous structure, or places on the property the object that is dangerous and constitutes the attractive nuisance, or, at most, if a third party is responsible for the nuisance coming into existence, to situations in which the property owner is actually aware of its presence and does nothing either to eradicate it, or to protect children against it. *Carter Coal Co.* v. *Smith* (Ky.) 191 S.W. 631; *Ball* v. *Middlesboro Town & Lands Co.* (Ky.) 68 S.W. 6; *Simmel* v. *New Jersey Coop. Co.*, 28 N.J. 1, 143 A.2d 521, 526; *Travell* v. *Bannerman* (N.Y.) 66 N.E. 583; *Gallagher* v. *Frederick*, 366 Pa. 450, 77 A.2d 427; *Cooper* v. *City of Reading*, 392 Pa. 452, 140 A.2d 792, 795.

This principle was summarized as follows in *Gallagher* v. *Frederick*, *supra*, p. 429.

> "The artificial condition on an owner's land on account of which he may be liable for injury to trespassing young children is such as *he* creates or maintains. That, of course, does not necessarily mean that an owner may not be said to maintain such a condition on his land which another has created but which the owner allows to exist." (Emphasis original.)

Similarly, a property owner is under no duty to inspect his property periodically for the purpose of searching out and discovering whether an attractive nuisance has been created on his premises by some third person. *Carter Coal Co.* v. *Smith* (Ky.) 191 S.W. 631; *Simmel* v. *New Jersey Coop. Co.* 28 N.J. 1, 143 A.2d 521, 526; *Gallagher* v. *Frederick*, 366 Pa. 450, 77 A.2d 427; and *Cooper* v. *City of Reading*, 392 Pa. 452, 140 A.2d 792, 795.

Thus, in *Simmel* v. *New Jersey Coop. Co.*, *supra*, it was stated (p. 526):

> "It should be recognized, however, that the land owner or occupier is not an insurer of the infant. He

has no duty to periodically inspect the premises in order to ascertain whether third persons, themselves trespassers, might have created artificial conditions thereon."

Counsel for the plaintiffs cite no cases, and independent research has discovered none, in which the owner of real property has been held liable for injuries caused by an attractive nuisance that had been created on his premises by a third person and of which the owner had not been aware.[4]

The foregoing principles with the limitations surrounding them, have been recognized and formulated by *Restatement of the Law, Torts*, Sec. 342, as follows:

§ 342. DANGEROUS CONDITIONS KNOWN TO POSSESSOR.

A possessor of land is subject to liability for bodily harm caused to gratuitous licensees by a natural or artificial condition thereon it (sic), but only if, he

(a) *knows of the condition* and realizes that it involves an unreasonable risk to them and has reason to believe that they will not discover the condition or realize the risk, and

(b) invites or permits them to enter or remain upon the land, without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to warn them of the condition and the risk involved therein."

(Emphasis supplied.)

[4] *Prosser*, in an article on *Trespassing Children*; 47 *Calif. Law Review*, 427, 451, states:

"No case has ever held that the landowner is required to police his premises, or to make any inquiry, to discover whether there is a likelihood that children will trespass."

Comment c. of Section 342, of the *Restatement*, states:

> "c. *Inspection.* A possessor of land owes to a gratuitous licensee no duty to prepare a safe place for the licensee's reception or to inspect the land to discover possible or even probable dangers."

Counsel for the plaintiffs stress the decision of the Court of Civil Appeals of Texas, in *Dezendorf Marble Co.* v. *Gartman* (Texas), 233 S.W. 2d 404, which has a superficial similarity to the instant case. In both cases, a child picked up on the defendant's grounds a container comprising an explosive, took it home and was injured when it exploded. It also appeared that children had been accustomed to come to play on the defendant's land. There the resemblance ends. The distinction between that case and the case at bar lies in the very vital circumstance that in the *Dezendorf* case the blasting cap that injured the child, belonged to the defendant and had been thrown on the ground by the defendant's employees. The defendant had been quarrying rocks on the property and the blasting caps were used in these explosions. If in the instant case the defendant had been using explosives on his property and the flare had been left lying around by one of his employees, the *Dezendorf* case might be applicable. As it is, however, no support can be found in it for the plaintiffs' position.

The principles to be evolved from the line of authorities discussed in this opinion, may be summarized as follows. If the owner or possessor of real property maintains a hazardous structure, or keeps a dangerous object, on his land, which has a natural tendency to attract or allure children, and if children are accustomed to visit or congregate on the grounds, then the property owner is liable for any injury that may be sustained by a child as a result of contact with the structure or object. This liability extends to a situation in which the dangerous object was placed

on the property by a third person if the property owner had actual knowledge of its presence. On the other hand, there is no liability on the part of the owner if a third party creates the dangerous situation and its existence is unknown to the property owner. The latter is under no obligation to make periodic inspections in order to ascertain whether any hazard has been created by any third person and to safeguard against any such remote possibility.

Applying the foregoing principles to the admitted facts of this case, no basis for liability is discernible. No legal or moral obligation can be perceived on the part of the defendants to pay the plaintiffs for the result of their tragedy.

The defendants' motion for summary judgment is granted.

ALEXANDER HOLTZOFF
United States District Judge

November 20, 1961.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16904

GERTRUDE McGETTIGAN, ET AL., APPELLANTS

v.

NATIONAL BANK OF WASHINGTON AND
FRED A. SMITH & CO., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided May 16, 1963

Mr. Harry W. Goldberg, with whom *Messrs. Morris Altman, Joseph Gelb* and *Max M. Goldberg* were on the brief, for appellants.

Mr. Paul R. Connolly, with whom *Mr. James A. Belson* was on the brief, for appellees.

Before EDGERTON, *Senior Circuit Judge*, and FAHY and WRIGHT, *Circuit Judges*.

FAHY, *Circuit Judge*: Gertrude McGettigan, individually and as mother and next friend of Charles S. McGettigan, a minor, sued the National Bank of Washington, a corporation, individually and as trustee, and Fred A. Smith & Company, a corporation, for damages alleged to have been suffered by the minor in circumstances to be explained insofar as this can be done on the present record. Following rather full pretrial proceedings, including the taking of depositions, and upon the basis also of allegations in the pleadings, the District Court granted the motion of defendants for summary judgment. Plaintiffs' mo-

tion for reconsideration was denied. This appeal was then taken by plaintiffs.

Although there may not now appear to be any "genuine issue as to any material fact," we think defendants were not "entitled to a judgment as a matter of law" and therefore not entitled to summary judgment. Fed. R. Civ. P. 56(c). The pleadings, depositions and other evidentiary matters before the court were sufficient if followed by proof at trial to permit a jury to find the facts now to be outlined. The defendant corporations were responsible, as owner and agent, respectively, for the care of a building near the heart of Washington known as 2413 Pennsylvania Avenue, N.W., held in the name of the bank defendant as trustee. In the rear of the main building was a small structure where the occurrences leading to this case arose. Although some years ago this structure was in good condition it had seriously deteriorated. Doors had disappeared. Windows were out and the glass broken. The structure was open to the elements, and was a hangout for persons of questionable occupations and habits. The interior was cluttered with debris and the roof was insecure. The structure was used at times as a sort of club house for young thieves, who engaged in the practice of stealing flares from various sources, including railroad cars and telephone trucks, and using them for their amusement near the premises. The place was the subject of complaints by neighbors. Beginning in 1955 an employee of the defendant agent made a weekly inspection, which disclosed accumulations of debris. A policeman on several occasions advised the agent of the decrepit condition of the premises, the accumulation of junk, and the presence of vagrants. Although the agent, Smith & Company, agreed to correct the situation, nothing was done prior to the accident soon to be described.[1] No ef-

[1] We do not hold that these conditions existed. The pleadings and depositions indicated plaintiffs could introduce evidence that they did exist.

fort was made to close the structure, remove the debris, or restrict its use by children, delinquents and vagrants.

On March 3, 1956, John, eleven years of age and brother of the minor plaintiff, was playing in the structure. He obtained from the trash and junk there a cylindrical, tubular object, which he took to his home nearby, unaware of what it was. And the boy had seen it several times before during the months he played in the structure. His mother either found the object lying in the kitchen or was given it by another son and placed it in a paper bag outside the back door where there was a small porch. The following day, March 4, the minor plaintiff, then nine years of age, was seen by his mother playing with the object, which he had broken in two. Material that looked like sand had come out of it. His mother told the boy to sweep this up. Some minutes later there was an explosion which severely burned the boy. It appears the substance was powder and that the boy applied a lighted match to waxed paper on which he had swept the powder.

It is not alleged that the defendants brought the flare to the premises or knew it was there.

We think the plaintiffs set forth facts which, if proved, would permit a jury to find that defendant landowner and his agent were negligent. This being so, and substantial damages having been alleged as stemming from that negligence, the case should have been submitted to the jury.

Neligence is "conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm." *Restatement, Torts* § 282 (1934); 2 *Harper & James on Torts* 896 (1956). And the standard of conduct to be applied is that of the reasonable man in like circumstances. See *Prosser on Torts* 124 (1955). Whether a defendant has acted as a reasonable man in the circumstances is said to depend upon whether his conduct—act or omissions—created an unreasonable risk of harm toward a plaintiff. This principle is sometimes

stated in terms of duty, *viz.*: whether the defendant had a duty to use care toward plaintiff, and if so whether it was breached by the conduct complained of. See Winfield, "Duty in Tortious Negligence," 34 Columbia L. Rev. 41 (1934). The ultimate question is whether defendant can fairly be said to be responsible for the injuries complained of.[2] If reasonable men could not differ in answering that question the court, it is said, should not allow the jury to speculate about it; but if reasonable men could differ and draw different inferences from the facts or find one set of facts when two are offered and from those found could conclude that defendant's conduct was negligent, then the jury ought to be permitted to answer the ultimate question. *Grand Trunk Ry. v. Ives*, 144 U.S. 408 (1892).

Defendants are in the position of an owner or occupier of land, for whom the common law created something of a special status. He was not liable at common law for injuries to a person coming on his land unless such person was an invitee, guest or licensee. If he were a trespasser, he could not hold the landowner or occupier liable for his injuries. See Green, "Landowner v. Intruder: Intruder v. Landowner. Basis of Responsibility in Tort," 21 Mich. L. Rev. 495 (1923). But the law has not remained static in this area. Just as it has advanced in recognition of the need for greater protection to both persons and property from the affirmative acts of another, making negligence the central basis for civil liability,[3] it also has tended to bring the landowner or occupier within similar rules, leaving his status less privileged than it was previously.

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[2] "On the whole the rules of accident law are so formulated as to give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do." 2 *Harper & James* at 881.

[3] *See, e.g., Brown v. Kendall*, 6 Cush. (60 Mass.) 292 (1850); 8 *Holdsworth History of English Law*, 446-59 (1937).

This has been especially evident in the case of children of tender years.

This brings us to the case of *Sioux City & Pacific R.R. v. Stout*, 84 U.S. (17 Wallace) 657 (1873). A six year old child was playing on an unguarded, unlocked railroad turntable which when set in motion caught and crushed his foot. The Court, seemingly treating the child's presence and that of other children on defendant's land in the past as but one of the circumstances in which it was to be decided whether the landowner's conduct was proper, said:

> [I]f from the evidence given it might justly be inferred by the jury that the defendant, in the construction, location, management, or condition of its machine had omitted that care and attention to prevent the occurrence of accidents which prudent and careful men ordinarily bestow, the jury was at liberty to find for the plaintiff.

84 U.S. at 661. From this beginning the courts have fashioned a concept called attractive nuisance, under which the status of an intruding child is like that of an invitee rather than a trespasser. In other words the principles of negligence become relevant notwithstanding the child came upon the owner's land without permission. But there was under the earlier approach of the doctrine the requirement of an allurement as well as the tests of negligence. This ceased to be a serious obstacle to recovery, however, when courts began to abandon the fiction of an invitation by allurement and recognized—as the Restatement has—another basis for the result reached in such cases as *Stout*, namely, the value of the lives of children to society. See, *e.g.*, *Wolfe v. Rehbein*, 123 Conn. 110, 193 Atl. 608 (1937); *Drew v. Lett*, 95 Ind. App. 89, 182 N.E. 547 (1932). And compare *Best v. District of Columbia*, 291 U.S. 411 (1934), *Sioux City & Pacific R.R. v. Stout*, *supra*, and *Eastburn v. Levin*, 72 App. D.C. 190, 113 F.2d 176 (1940), with *United Zinc Co. v. Britt*, 258 U.S. 268 (1922), and *Brannan v. Wimsatt*, 54 App. D.C. 374, 298 Fed. 833 (1924).

In *Best* v. *District of Columbia*, *supra*, the dangerous condition which caused the child's death was a hole in the defendant's wharf and not the piles of sand upon which children had previously played. And in *Eastham* v. *Levin*, *supra*, this court said:

> The underlying question is whether it is better to let occupants arrange their premises in total disregard of neighboring children, or to require them to take such precautions as a normal person would when their premises are attractive and insidiously dangerous to children too young to look out for themselves and when the intrusion of such children is likely. On the one side is the occupant's interest, and the general interest, in the profitable use of land. On the other is the child's interest, and the interest of his parents and of society, in life and limb and in compensation for their injury.

72 App. D.C. at 192, 113 F.2d at 178. The emphasis here is upon a balancing of several interests in the light of conduct that threatens harm, judged by the standard of the reasonable man. And *see Branaw* v. *Wimsatt*, *supra*.

In the present case defendants contend that since the dangerous instrumentality was not used by them or brought by them onto their premises the plaintiffs could not recover. This contention fails to take account of the scope both of the law of negligence and the full development of the attractive nuisance doctrine, that is, the rule of liability of a landowner for negligence with respect to children of tender years.[4] Courts have extended to such

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[4] Even 90 years after the *Stout* decision, an adult on the land of another confronted by the same conditions would most likely be held to have assumed the risk or been contributorily negligent or to have no valid claim under the older traditional concepts of duty according to category—trespasser, licensee, invitee. See Green, "Landowners' Responsibility to Children," 27 Texas L. Rev. [illegible]

children the protection of the law to include injuries occurring off the defendant's premises. Thus where a child found dynamite caps and took them home where his brother, also a child, played with them and was injured by the resulting explosion, the injured child was allowed to recover. *Dezendorf Marble Co.* v. *Gurtman*, 333 S.W.2d 404 (Tex. Civ. App. 1960). See also *Ills* v. *City of Cloquet*, 119 Minn. 277, 138 N.W. 33 (1912); *Kingsland* v. *Erie County Agricultural Soc'y*, 298 N.Y. 409, 84 N.E.2d 38 (1949); *Lone Star Gas Co.* v. *Parsons*, 159 Okla. 52, 14 P.2d 369 (1932). It is said that the defendant's conduct in maintaining the condition carries an unreasonable risk of harm to such children when the presence of children on the premises is expected. See Prosser, "Trespassing Children," 47 Calif. L. Rev. 427, 448-50 (1959).

Nor is the doctrine inapplicable because the dangerous condition is not created by the landowner or possessor. If third persons, even trespassers unknown to the landowner or occupier, come onto the land and create the artificial condition or deposit the harmful object, and the owner does nothing to remedy the condition after a reasonable opportunity to do so, he may be responsible. *Roman* v. *City of Leavenworth*, 90 Kan. 379, 133 Pac. 551 (1913); *Simmel* v. *New Jersey Coop. Co.*, 47 N.J. Super. 509, 136 A.2d 391 (App. Div. 1957); *Johnson* v. *Scullen Constr. Co.*, 95 N.W.2d 409 (Minn. 1959). But see *Gallagher* v. *Frederick*, 366 Pa. 450, 77 A.2d 427 (1951).

In the language of the *Restatement, Torts* § 339 (b), "the condition [must be] one of which the possessor knows or should know . . . ." One authority suggests that the alter-

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13, note 39 (1948), for a brief discussion of the adult's status and collection of some of the cases. But there is the suggestion here that a slight trend away from such result in cases of trespassing adults may be in the making.

native "should know" does not reflect the law. This view fails to appreciate the development reflected in the Restatement as well as in some of the decided cases, see n. 5, *supra*, and text p. 6, *supra*, which shifts liability to children to a straightforward negligence basis. The effect of the progressive application of the attractive nuisance doctrine has been, we think, to erase the line separating landowners and occupiers from other persons generally, when their acts or omissions create an unreasonable risk of harm to children of tender years. James, "Tort Liability of Occupiers of Land: Duties Owed to Trespassers," 63 Yale L.J. 144, 164 (1953). See, *e.g.*, *Wolfe* v. *Rebbein*, *supra*, where it is said:

> "If the presence of children is to be anticipated, the care to be exercised is such as is reasonable having in view the probability that children, because of their youth, will not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it. . . .

123 Conn. at 116, 193 Atl. 610-11.

Applying these principles to the facts which might be proved in the instant case, which we repeat in summary form, we find a rundown building in or near the heart of

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[Notwithstanding the wishful thinking of distinguished legal writers, no case has ever held that the possessor is required to inspect his land, or to police it, to discover whether there is any condition upon it which would be likely to harm trespassing children. . . . [O]n the contrary, the decisions are all to the effect that unless he knows of the condition there is no liability.

Prosser, *supra*, 47 Calif. L. Rev. at 451. To the contrary, see *Coeur d'Alene Lumber Co.* v. *Thompson*, 215 Fed. 58 (9th Cir. 1914); *Dahn* v. *S. Brand Coal and Oil Co.*, 63 N.W.2d 6 (Minn. 1954); *Smith* v. *Otto Hendrickson Post 223, American Legion*, 62 N.W.2d 254 (Minn. 1954); *Johnson* v. *Scalley Construction Co.*, *supra*; and *Simmel* v. *New Jersey Coop. Co.*, *supra*.

a large city. Doors had disappeared from the structure, and the interior had become cluttered with debris of various kinds. Persons of questionable habits used the place as a hangout. Neighbors complained of the building's condition. Policemen advised the owner's agent on more than one occasion of the building's rundown condition and of the periodic presence of vagrants. Furthermore, a general provision of the D.C. Code was in effect at the time which placed upon landowners the specific responsibility to see to it that their land was kept free of dangerous debris.[5]

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[5] D.C. Code § 504 provides as follows:

> The existence on any lot or parcel of land in the District of of Columbia, of . . . miscellaneous materials or debris of any kind, including substances that have accumulated as the result of repairs to yards or any building operations, *insofar as they affect the public health, comfort, safety, and welfare is hereby declared a nuisance dangerous to life and limb*, and any person, corporation, partnership, syndicate, or company, owning a lot or parcel of land in said District on which such a nuisance exists who shall neglect or refuse to abate the same to the satisfaction of the commissioners of the District of Columbia, after five days' notice from them to do so, shall, on conviction in the Municipal Court . . . be punished by a fine of not exceeding $50 for each and every day said person, corporation, partnership, or syndicate fails to comply with such notice. . . . [Emphasis supplied.]

And this court has decided:

> Where the acts which create a public nuisance cause also private and special injury to an individual, an action at law will lie. [Citing, *inter alia*, *Aldrich* v. *Wetmore*, 52 Minn. 164, 53 N.W. 1072 (1893).]

District of Columbia v. *Totten*, 55 App.D.C. 312, 318, 5 F.2d 374, 380 (1925). See also Thayer, "Public Wrong and Private Action," 27 Harv. L. Rev. 317, 334-35 (1914). In *National Bank of Washington* v. *Dixon*, 112 U.S. App. D.C. 383, 303 F.2d 507 (1961), this court approved the trial court's submission to the jury, on the question of a landowner's liability for personal injuries, the subsidiary question whether certain housing regulations were violated and if so whether the violation amounted to negligence.

Children had played on the premises previously. The plaintiff's brother had himself played there before the occasion in question when he pulled out of the debris the object which when exposed to the minor plaintiff and his childish curiosity about its contents caused his injuries. Finally it is not contended that defendants had attempted either to remove the trash or to board up the premises. Upon proof of these circumstances we think the question of defendants' negligence should be submitted to the jury.

This is not a case of a vacant lot in the suburbs where a trespasser but the day before has set a trap, nor a case of a boarded warehouse in the city where others have broken in and stored their loot. Rather our case appears at present to be one of a landowner who has allowed flammable flares to be deposited—undetected and unremoved—for such a period of time as to warrant submitting to the jury the question whether in all the circumstances of the case this was negligent. There is not only the continued presence of the flare, the harmful nature of which could not readily be appreciated by young children, but the accumulation of junk which defendants failed to remove and of which the flare turned out to be a part. The data before the trial court created an issue as to an unreasonable risk of harm towards the minor plaintiff, a child of the neighborhood, whose injury a jury might reasonably conclude might have been prevented by due care on the part of defendants. The jury should be allowed to decide whether due care was in fact exercised, because reasonable men might differ as to what was required of defendants in the factual situation the jury could have found to exist. See *Grand Trunk Ry.* v. *Ives*, *supra* at p. 4.

Two matters remain for additional comment. First, we are referred to the concept of foreseeability represented by the case of *Palsgraf* v. *Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928), wherein liability was denied when the court found that a push of a passenger carrying con-

cealed fireworks was not a wrong with respect to the plaintiff standing some distance down the platform. The court did not say that no risk of harm was created by the act of the defendant's agent. Rather it found that the ambit of the risk did not include the plaintiff injured by falling scales after the explosion caused by the dropping of the fireworks by the passenger who was pushed. The circumstances of the instant case are different in significant respects, for here a general condition prevailed which put the landowner on notice, or so the jury could find, that his land was being abused or misused. Furthermore the presence of children who could not be expected to appreciate and therefore avoid the risk created by the flare is a factor here of utmost significance.

Finally, whether the negligence which we think can be made out on the facts here alleged will render the appellees responsible in damages is a question of proximate cause.[1] We are told that the minor plaintiff's mother had an opportunity to see the flare and left it in reach of the child injured by it. We agree that the record supports such a view of the facts. But we are not prepared to say that the defendants' negligence, if any, was not a proximate cause of the injury, bearing in mind that in the case of minors the negligence of a parent may not normally

[1] Insofar as the appellees rely on lack of foreseeability as going to the issue of proximate cause we point out this court has in the past said:

> [W]e are committed to the rule in negligence cases that where in the natural and continual sequence unbroken by any intervening cause an injury is produced which but for the negligent act would not have occurred, the wrongdoer will be liable. And it makes no difference whether or not that particular result was foreseeable.

Hitaffer v. *Argonne*, 87 U.S. App. D.C. 57, 61, 183 F.2d 811, 815 (1950).

be imputed to the minor.* See 2 *Harper & James, supra*, at 1270-71; and cases collected in 15 A.L.R. 414 (1921). And, generally on the question of proximate cause, see *Hanna* v. *Fletcher*, 97 U.S. App. D.C. 310, 231 F.2d 469 (1956), and *Dezendorf Marble Co.* v. *Gartman, supra*; *Vills* v. *City of Cloquet, supra*; *Kingsland* v. *Erie County Agricultural Soc'y, supra*. Furthermore, and we do not pass upon this aspect of the case since in a trial it may be permitted to go to the jury, even if two or more acts of negligence concur to produce a single injury, one tortfeasor is not relieved of liability merely because his negligence was earlier in time. It may still be a proximate cause of the injury. See *Prosser on Torts* §§ 45 & 46 (1955); 2 *Harper & James, supra*, § 20.3; *Restatement, Torts*, § 452 (1934).

The granting of appellees' motion for summary judgment was erroneous and the order appealed from is accordingly reversed.

Reversed.

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* If the jury were to find that the parent was contributorily negligent, the parent's action in her own behalf would alone be affected.

[Filed June 27, 1963]

Order

It is ORDERED by the court that the opinion decided May 16, 1963, in the above-entitled case is amended as follows:

On the last line of the text on page 7, after "(App. Div. 1957)" insert the following:

", *rev'd on other grounds*, 28 N.J. 1, 143 A.2d 521 (1958)"

so that the line will read:

"509, 136 A.2d 301 (App. Div. 1957), *rev'd on other grounds*, 28 N.J. 1, 143 A.2d 521 (1958); *Johnson* v. *Scudley*"

On page 8, in the next to the last line of Footnote 5, after the word "supra", change the semicolon to a period and delete the following:

"and *Simonel* v. *New Jersey Coop. Co., supra*."

Per Curiam.

Dated: June 27, 1963.

Supplemental Opinion

Filed June 27, 1963

Before EDGERTON, *Senior Circuit Judge*, and FAHY and WRIGHT, *Circuit Judges*.

FAHY, *Circuit Judge*: Appellees' petition for rehearing en banc, which has been denied, points out that we failed to note that the proposed change in the language of § 339 Restatement, Torts, had been approved by the American Law Institute. As the section now reads the language "should know" in Clauses (a) and (b) is changed to "has reason to know." With respect to this change the Institute Council stated that the decisions are unanimous to the effect that the possessor is under no duty to investigate to ascertain whether children are trespassing, or are likely to trespass. The Council also explained that "should know" involves an obligation of reasonable care to investigate the facts, while "has reason to know" means that the possessor knows enough to infer that the fact exists, or to govern his conduct on the assumption that it exists. We adhere to our views as expressed in our opinion, adding that were we to apply the changed language of Section 339 of the Restatement to this case a reversal would still be required; for the data before the District Court if followed by proof would enable a jury to find that appellees had reason to know that the "fact"—that is, the described condition—existed and the place was being used by children. If, however, the change in Section 339 means that in such a situation as is now before us the appellees must be shown to have had reason to know that the flare itself existed among the rubbish, we disagree. A landowner or occupier may know or be charged with notice of a condition on his premises which should reasonably lead him to take precautions against intruding children of tender years without specific, positive, and current knowledge of the particular thing, constituting a part of that condition, which afterwards causes

injury. As an example, an unguarded and clogged pond or pool of generally shallow water may conceal a deep well, as in *Coeur d'Alene Lumber Co.* v. *Thompson*, 215 Fed. 8, 17-18 (9th Cir. 1914). And see 2 *Harper & James on Torts* 1458-59 (1956).[1]

[1] The cited authority provides the following analysis:

> Inspection is one of the commonest precautions which the duty of care may require a defendant to take for the removal of danger. But it has been said that the occupier of land owes no duty of inspection to discover conditions dangerous to trespassing children. Such a rule would, of course, be a logical enough corollary of the notion that landowners owed no duty of care to trespassers. But if the general principles of negligence are to be substituted for the older special immunities, then any exemption from a duty to inspect, as a matter of law in all cases, is either a vestige of the older principle which is out of place under the newer one, or the erection of a fixed standard of conduct that relieves one class of defendants from one of the precautions commonly incidental to the exercise of ordinary care. Here, as elsewhere, in any given case, inspection may not be feasible or may seem uncalled for, or an inspection which would have disclosed the particular condition may be unreasonably burdensome. And under general principles, if the danger was neither known in fact nor discoverable by reasonable inspection, the occupier cannot be held. There is no reason in logic or policy for extending the exemption further. [Footnotes omitted.]

[Filed June 27, 1963]

Order

On consideration of appellees' petition for rehearing en banc, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

Dated: June 27, 1963.

Circuit Judge Wilbur K. Miller would grant the petition.

Circuit Judge Danaher dissents from the foregoing order and would grant appellees' rehearing en banc for the following reasons: "This extraordinary case involves the ultimate possible liability of a landowner for injuries received, not by one who was a trespasser, but by his younger brother playing in his own back yard. If the opinion were limited to permit recovery because of injuries received by the trespasser when on the land, due to causes of which the landowner had some notice—or as to the existence of which he fairly might be charged with notice—I would think the opinion sound. Compare, for example, *Dezendorf Marble Company* v. *Gartman*, 343 S.W.2d 441 (Sup.Ct. Tex. 1961), where the appellant owned the dynamite cap and as a user of blasting equipment owed a high degree of care.

Here, however, the injury did not occur on the land. The plaintiff's 11-year-old brother brought the flare to his home. It bore a label showing it had been manufactured by the "Hitt Fireworks Co." His 15-year-old brother took the flare from the younger lad, and it was given to the boy's mother. Labeled as it was, the 15-year-old boy obviously recognized it as a possible source of danger. Certainly the mother could have done so. The mother had it within her power to make a condition of safety sure, but did not do so. Instead, she placed the flare in her own trash from which the following day it was removed

by her younger son, the plaintiff. The lad broke it open and released the powder which looked like that found in fireworks. The mother saw what had happened. She thought it looked like sand. She thereupon directed the child to clean up the powder and left. Then it was that the boy found wax paper, lighted it and touched off the powder to his injury.

It well may be that a study of the whole record and consideration of the authorities would find me in agreement with what has been said by the sitting division. I am sufficiently disturbed by the full import of the far-reaching result here reached that I would have liked to hear the case argued.

Circuit Judge Bastian did not participate in the foregoing order.